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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

HENRY W. GRUNEWALD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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The petitioner respectfully asks for a writ of certiorari to the Court of Appeals for the Second Circuit to review a judgment of that Court affirming a conspiracy conviction in the District Court for the Southern District of New York. Convicted with him were two co-defendants, Daniel A. Bolich and Max Halperin. The latter two were also convicted on other counts. The affirmance was originally unanimous as to petitioner, but divided as to co-defendant Halperin. On petition for rehearing, one judge dissented and voted to reverse as to all defendants.

Opinions.

The majority and first dissenting opinions of the Court of Appeals were filed April 10, 1956 and are not yet officially reported, but appear in volume V appendix, pages 288a to 357a. A further dissenting opinion was written by

Judge Frank on a petition for rehearing and appears at pages 380a to 393a of volume V appendix.

Jurisdiction.

The judgment of affirmance was dated and entered April 10, 1956. A petition for rehearing, duly filed on April 20, 1956 and submitted April 24, 1956, within the fifteen day period allowed therefor by Rule 25 of the Court of Appeals Rules, was denied, one judge dissenting, by order dated and entered June 1, 1956. Judge Frank, who had originally concurred in affirmance of petitioner's conviction, revised his position to dissent from such affirmance.

Jurisdiction of this Court to review is granted by Section 1254 (1) of Title 28 U. S. C. A. and Rule 37 (c) of the Federal Rules of Criminal Procedure.

Questions Presented.

1. Whether conviction of a conspiracy to procure from the Fraud Bureau of the Internal Revenue Department a decision not to prosecute a tax fraud, where the object of the conspiracy had been accomplished by January, 1949, and prosecution was barred under the statute of limitations by January, 1952, may be sustained, on the theory that the conspiracy must have included a continuing agreement to conceal—the indictment having been found October 25, 1954, and the proof being that one or more of the conspirators in March, 1952, attempted to cover their tracks from investigators.

2. Whether independent acts of alleged conspirators, after the accomplishment of the object of the conspiracy and done without the knowledge or the participation of

the petitioner Grunewald, may suffice to support a charge against him that the original conspiracy included a continuing purpose to conceal so that the conspiracy might be deemed to extend down to the last act of concealment.

3. Whether an alleged continuing conspiracy to conceal could be found as to the petitioner Grunewald, when he was concerned only with the original object of the conspiracy and was acquitted by the Trial Court on three counts of attempting to influence witnesses, which the Court charged the jury could be acts of continuing concealment.

4. Whether a purpose to continue to conceal the accomplishment of the primary conspiracy may be inferred from the fact that the conspirators would be presumed to know that their activities would always be open to investigation—whether a subordinate conspiracy to conceal may be implied from the original crime.

5. Whether the Trial Court committed error in permitting the jury to find a continuing conspiracy to conceal from the fact that, more than three years after the object of the conspiracy had been accomplished, the petitioner Grunewald, when his secretary was subpoenaed before a grand jury, told her she need not answer various questions and could say she forgot.

6. Whether the Trial Court committed error in permitting the defendant Halperin, the only witness for the defense, to be cross-examined, for the purpose of impeaching his credibility, on the fact that he had been, prior to the trial, subpoenaed before a grand jury and had there claimed his constitutional privilege against self-incrimination on a long line of questions. The constitutional privilege thus infringed is that part of the Fifth Amendment

which reads: "* * * nor shall be compelled in any criminal case to be a witness against himself * * *".

7. Whether the Trial Court committed error in allowing the government, on redirect examination of its chief witness, an admitted perjurer, to bolster his credibility by showing that, three years prior to the trial, in an attempt to make a deal for immunity, he had authorized his attorney to make a hypothetical statement concerning the same facts testified to on the trial—on the theory that this was a prior consistent statement made before any motive to fabricate existed.

Constitutional Provision and Statutes Involved.

Fifth Amendment.

"* * * nor shall be compelled in any criminal case to be a witness against himself * * *."

Section 371, Title 18 U. S. C. A.

"371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Section 3282 Title 18 U. S. C. A.

(As applicable to offenses prior to 1954 amendment.)

"3282. *Offenses not capital.*

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished

for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. June 25, 1948, c. 645, 62 Stat. 828."

Statement of the Case.

Grunewald was convicted in the Southern District of New York of conspiracy under Section 371, Title 18 U. S. C. A. and sentenced to five years and $10,000 fine (Grunewald Appendix, pp. 2-3). Bail pending appeal was granted by the Trial Judge (Grunewald Appendix, p. 2). Bail was continued by the Court of Appeals, Second Circuit, pending this application.

The original decision of April 10, 1956 affirmed unanimously as to Grunewald, but Judge Frank filed a dissenting opinion as to co-defendant Halperin, on the ground that his constitutional rights were violated by improper cross examination, tending to affect his credibility. Judge Frank held the error fatal on the ground that Halperin, if believed, could reasonably have been acquitted.

Since Halperin was the one claimed by the government to have made all the arrangements with Grunewald and since he testified for the defense and vigorously disputed the charge, any error as to him necessarily affected Grunewald also.

On petition for rehearing, denied June 1, 1956, Judge Frank dissented as to all defendants on the ground that the Statute of Limitations would have required acquittal on the theory on which the case was submitted to the jury and voted for a new trial.

The indictment was in seven counts (Grunewald Appendix, pp. 5-19). The first count, on which alone the petitioner Grunewald was convicted, charged a conspiracy

of numerous persons to defraud the United States in the administration of the revenue laws and to influence witnesses before a congressional investigating committee and before a grand jury and it was said to be a part of the conspiracy that continuing efforts would be made to avoid detection by any governmental body, whether executive, legislative or judicial.

Grunewald was not a defendant on the second count. The third and fourth counts are not material here. The Trial Court dismissed one and granted acquittal on the other. The fifth, sixth and seventh counts charged attempts to influence witnesses in March, 1952. The Trial Court acquitted Grunewald on these counts (Grunewald Appendix, p. 583).

The charge arose out of the disposition of two tax fraud cases which were being investigated in 1948 by the Fraud Bureau of the Internal Revenue Department (Grunewald Appendix, pp. 287-8, 430). One was known as the *Pattullo Modes* case and the other as the *Gotham Beef* case. Both concerns were represented by the New York law firm of Schopick & Davis (Grunewald Appendix, 303, 317-18). The defendant Halperin had office space with this firm and was known to be a good friend of Henry Grunewald, who was, in turn, known as a man of influence in Washington and a friend of Bolich (Grunewald Appendix, p. 312), who, until September 1, 1948, was the agent in charge of the New York office of the Fraud Bureau and thereafter was Assistant Commissioner of Internal Revenue (Grunewald Appendix, pp. 475-6).

The government's case is shown in the testimony of Davis. He said that he asked Halperin to get help in each case from Grunewald (Grunewald Appendix, pp. 311-12, 315-16); and that Halperin told him Grunewald wanted

$100,000.00 in the *Pattullo Modes* case and $60,000.00 in the *Gotham Beef* case (Grunewald Appendix, pp. 330, 325). The *Gotham Beef* case ruling that there would be no prosecution came down in October, 1948 and Davis testified that $60,000.00 in cash was turned over to Halperin at that time to give to Grunewald (Grunewald Appendix, pp. 327-8). The *Pattullo Modes* case ruling that there would be no prosecution came down on January 10, 1949 and Davis testified that $100,000.00 in cash was turned over on the 12th of January to Halperin for Grunewald (Grunewald Appendix, pp. 333-5).

The object of the conspiracy was expressed by the Davis clients as follows:

Mr. Marks (*Pattullo* case, Grunewald Appendix, p. 30):

> "He says all he could promise was that there would be a memorandum put into our file that the case was to be settled on a civil basis."

Mr. Tobias (*Gotham Beef* case, Grunewald Appendix, p. 167):

> "Now, the exact terms of the escrow * * * was * * * that until I were to have heard with my own ears from the special agent's office from a responsible official there that was to be no criminal prosecution in the Gotham matter, * * * the money was not to be released."

Both of these objects were fully accomplished by January, 1949 and prosecution was barred by January, 1952.

In August, 1951, a congressional committee inquiring into tax matters, subpoenaed the Pattullo Modes people, but they claimed their privilege (Grunewald Appendix, p. 47).

In March, 1952, a grand jury in the Eastern District of New York, inquiring into the *Pattullo Modes* case and the

Gotham Beef case, subpoenaed the Pattullo Modes people and the Gotham Beef people (Grunewald Appendix, pp. 78, 116, 151). Davis and Halperin had talks with these prospective witnesses in March, 1952, which the government charged in the fifth, sixth and seventh counts were designed to persuade the witnesses to remain silent (Grunewald Appendix, pp. 47-49, 151). Halperin was also subpoenaed before this same grand jury, but claimed his privilege on all the matters in issue (Grunewald Appendix, pp. 694-717). A part time secretary, who had worked for Grunewald in Washington during the last half of 1949 and during the last half of 1950 and knew nothing about these tax cases, was also subpoenaed to this grand jury, although not actually called before it as a witness. She testified that before she came up, Grunewald told her she did not have to testify about his personal affairs and could say she forgot (Grunewald Appendix, pp. 536-42).

The direct evidence relied upon to connect Grunewald with the original conspiracy was testimony of Davis that he met with Grunewald and Halperin on one occasion in October, 1948 in Washington at which time Halperin said that Grunewald had agreed to accept $100,000.00 in the *Pattullo* case, whereupon Davis thanked him and Grunewald said, "O. K., O. K." (Grunewald Appendix, p. 330).

The indictment was found October 25, 1954 (Grunewald Appendix, p. 1).

Argument.

1. Statute of Limitations. All parties agreed that the three year statute of limitations found in Section 3282, Title 18, U. S. C. A. was applicable to the conspiracy charge. The change of this limitation to five years did not occur until September, 1954. The prosecution for a con-

spiracy to procure the two no-prosecution decisions would, therefore, have been barred by January, 1952. To avoid this, the government added to the conspiracy charge the element of a continuing agreement to conceal. This theory was sustained by the Trial Court and the Court of Appeals. The majority opinion below says, concerning the issue of the statute of limitations: "This is an interesting and important question, seemingly one of first impression."

We contend that the question was not of first impression, but had been essentially answered in our favor by the decisions in this Court in *Krulewitch* v. *United States*, 336 U. S. 440 and *Lutwak* v. *United States*, 344 U. S. 604.

It was conceded by the government at the trial that the only overt acts relied upon within the period of three years before the filing of the indictment were alleged acts of concealment (Grunewald Appendix, p. 579). The acts relied upon occurred in February and March, 1952, during the grand jury investigation, and are set out in the Trial Court's charge (Grunewald Appendix, pp. 750-1). The result is that, from the fact that individual acts of covering up may have occurred after the statute of limitations had run, the jury was permitted to find an original and continuing conspiracy to conceal.

In his second dissenting opinion in the Court below, Judge Frank said:

> "And here if—as the jury may well have found—the conspiracy ended in 1949 (when Bolich promised the taxpayers immunity from tax evasion prosecution if they confessed and when they then confessed), the record contains no evidence, other than overt acts of concealment, reasonably warranting an inference of an agreement to conceal as part of the conspiracy. • • • If the charge here is sustained, then the statute of limitations in conspiracy cases could be suspended indefinitely by an act of conceal-

ment by any of the conspirators at any time, so long as the jury found that the mere existence of a conspiracy implied an agreement to conceal it.

This will not do, in the light of *Krulewitch* v. *U. S.*, 336 U. S. 440, 444."

In the *Krulewitch* case, this Court rejected the theory that a conspiracy to conceal would be implied from the very fact that criminals, naturally, must do their best to conceal in order to escape punishment. In the *Lutwak* case, where the conspiracy to conceal was alleged in the indictment, this Court held that acts of concealment, when the matter came under investigation some years later, did not suffice to prove an original conspiracy to conceal. This Court said, 344 U. S. at page 616:

> "This is not evidence that the conspiracy included the further agreement to conceal. It is in the nature of an afterthought by the conspirator for the purpose of covering up.".

And the Court repeated its comment about implicit conspiracy made in the *Krulewitch* case as follows:

> "We are not persuaded to adopt the government's implicit conspiracy theory, which in all criminal cases would create automatically a further breach of the general rule against the admission of hearsay evidence.".

In the *Lutwak* case, the particular admission of evidence complained of was sustained on another ground, but even from this ruling three Justices of this Court dissented. In such dissenting opinion, the doctrine of implied secondary conspiracy to conceal was discussed and it was said, page 622:

> "This revival of the long discredited doctrine of constructive conspiracy would postpone operation of

> the statute of limitations indefinitely and make all manner of subsequent acts and statements by each conspirator admissible in evidence against all.".

The Court below argued that there was a campaign of concealment shown in the details of the charges against Halperin in Counts 5, 6 and 7. Yet, the petitioner Grunewald was acquitted of any complicity in those acts.

The Court below also argued that there was a conspiracy to conceal because "These appellants must have known from the outset that the success of their enterprise was in real danger at all times * * *." Thus, the Court below goes back to the theory of implied conspiracy, which was rejected in the *Krulewitch* case, and relies upon independent acts of covering up, long after the original conspiracy and of which this petitioner was acquitted, to establish both an original and a continuing conspiracy to conceal. If this be right, then the statute of limitations has been abolished and, so long as any conspirator makes any effort to conceal, every conspirator remains continuously liable to prosecution.

Illustrating further the errors in such a course, is the action of the Trial Court in submitting to the jury the question whether Grunewald's conversation with his secretary in 1952 could be found to be an overt act of concealment. The girl had not been around in the days of the *Pattullo Modes* and *Gotham Beef* cases. She had worked for Grunewald for the last half of 1949 and the last half of 1950. Grunewald's comment when she was subpoenaed, that she did not have to answer questions about his personal affairs and could say she forgot, was obviously nothing more than his spontaneous objection. Yet, the Court gave the jury the right to find the existence of a continuing conspiracy based upon that particular incident (Grunewald

Appendix, pp. 750-1). Specific exception was taken and overruled (Grunewald Appendix, pp. 778, 784).

The theory on which the majority of the Court of Appeals affirmed the conspiracy conviction was that the object of the conspiracy was to guarantee the taxpayers against prosecution at any time until the same was barred. Judge Medina put it this way:

> "What the fixers had to sell was freedom from criminal prosecution for tax frauds. What the taxpayers bargained for was protection from a tax evasion prosecution. * * * The six-year Statute of Limitations (26 U. S. C. [1940 Ed.] Section 3749) did not run in favor of the taxpayers until some time after the commission of the overt acts relied upon."

So, the Court continued, they had to conceal after January, 1949, to prevent the undoing of their work.

The trouble with this theory is that:

(1) The factual premise is wrong to start with—in both tax cases the object was precisely stated to be to obtain a particular ruling (see *supra*, p. 7). There was no general or extended guarantee against prosecution.

(2) It implies an original and continuing agreement to conceal from a necessity to keep the crime from being discovered, which is exactly what this Court said in the *Krulewitch* case could not be done.

(3) It tries to avoid the *Krulewitch* case and *Lutwak* case by first extending the scope of the conspiracy to a blanket protection to run until the tax prosecution is barred and then says that, on that theory, the subsequent acts of concealment (conceded by the government to be the only acts within three years prior to this indictment [Grunewald Appendix, p. 579]) are within the period of the original

conspiracy and so may serve as ground for an inference that the original conspiracy included an agreement to conceal.

(4) No such theory was submitted to the jury. On the contrary, the Trial Judge (following the indictment) submitted the case on the question whether, even though the original purpose of the conspiracy was accomplished when the no prosecution rulings were obtained, there was included in the conspiracy an agreement to avoid detection of the crime, which addition he said could be inferred from the later acts of concealment (Grunewald Appendix, pp. 750-53).

As Judge Frank, in his dissent on the petition for rehearing, points out, this permitted an act of concealment after the conspiracy was accomplished to revise and extend the conspiracy and work an indefinite extension of the Statute of Limitations and was forbidden by the rulings in the *Krulewitch* and *Lutwak* cases. On the government's original theory and the theory on which the case went to the jury, an acquittal should have been ordered. (We asked this by motion—Grunewald Appendix, pp. 555-561, 725, denied, pp. 583, 725—and by requested instructions 23 to 27, pp. 793-4, which were denied, pp. 728-9.) To allow room for the theory advanced by Judge Medina in the majority opinion, at least a new trial was necessary. Which is, as we understand it, the basis for Judge Frank's view that a new trial should be granted.

Finally, the conviction could not be sustained on the theory that there was a new conspiracy to conceal an old conspiracy. (a) That was not the basis for the affirmance. (b) There was no proof of such a later conspiracy. (c) Grunewald was acquitted of the charge of complicity in efforts to influence the testimony of witnesses. (d) To submit, as a single conspiracy, proof of two conspiracies,

one of which was barred by the statute of limitations, would be error and was particularly objected to at and before the trial and motions made to compel an election or to dismiss as to the barred conspiracy (Grunewald Appendix, pp. 561, 566-572).

Judge Frank recognized all this when he said, in his second dissenting opinion:

> "* * * It could serve, at most, to prove a new conspiracy to conceal an older conspiracy. In that event (although such a new conspiracy would be evidence of the older conspiracy) the defendants could not, on such evidence, be convicted of the older conspiracy which ended in 1949, since the statute of limitations would have run against the older three years after 1949. See *U. S.* v. *Siebricht*, 59 F. 2d 976, 978 (C. A. 2) to the effect that an old conspiracy 'could not be revived by the breath of a new and different conspiracy * * *'. The defendants were not indicted for such a new conspiracy, and the judge's charge precluded a conviction based thereon."

2. Cross examination as to claim of privilege against self-incrimination. A major constitutional question is presented by the cross examination of the defendant Halperin with respect to his previous claim of privilege before a grand jury (Grunewald Appendix, pp. 694-717). As Judge Frank said in his dissenting opinion below:

> "It is noteworthy that the Supreme Court has never applied the Raffel doctrine to a case where the previous exercise of the privilege occurred in a grand jury hearing.".

What happened here was that Halperin, who contradicted Davis and other government witnesses at every material point and established a clear issue of fact for himself, Grunewald and Bolich, was attacked on cross

examination because of his claim of privilege before the grand jury and made to admit that he said that the answers might incriminate him and that he was answering truthfully at the time. This was permitted as bearing upon his credibility (Grunewald Appendix, p. 768). Since the factual defense rested upon his credibility, the attack was, of course, destructive. Repeated objection was made.

In *Raffel* v. *United States,* 271 U. S. 494 (1926), this Court held it proper on a second trial to question a defendant on the stand concerning his failure to take the stand in the first trial. From this ruling the Court below has proceeded to hold proper the cross examination in the case at bar. The dissenting opinion below holds that the *Raffel* case has been implicitly overruled by *Johnson* v. *United States,* 381 U. S. 189. There this Court held it improper to comment upon a claim of privilege where a defendant took the stand and claimed his privilege as to some questions and was sustained in that claim by the Trial Court.

Moreover, our situation differs markedly from the *Raffel* case. In that case, the defendant's failure to take the stand in the first trial was something done in open court at a public trial where he was represented by counsel. The situation is far different when a prospective defendant is brought into the secrecy of the grand jury room prior to trial, where even a judge is not present, and is subjected to a one sided barrage of questions which may have no other purpose than to elicit a refusal based upon possible self-incrimination. The well known fact that most attorneys will not permit their clients to testify under such ex parte conditions should not be used against a defendant who thereafter takes the stand in his own defense.

It is no answer to say that, when he does take the stand, he waives his privilege. He does so, of course, and

then may be asked about any criminal or disgraceful conduct in his past. But this is not to say that his prior claim of privilege was disgraceful or criminal or an implied admission of guilt or perjury to any degree (See *Slochower* v. *Board of Higher Education*, decided by this Court April 9, 1956). Yet, cross examination as to a prior claim of privilege, on the theory that it affects credibility, is only sustainable upon the theory that the prior claim of privilege is inconsistent in some way with the subsequent claim of innocence. It is thus a serious infringement of the constitutional privilege. The rule established in many jurisdictions is that a suspect may not even be subpoenaed before the grand jury (*People* v. *De Feo*, 308 N. Y. 595).

To permit such a course is to allow a prosecutor to subpoena a prospective defendant and put him to the choice of the one-sided inquisition or the giving up of any hope that he can subsequently take the stand in his own defense. If this Court's repeated rulings, that the privilege may not be impaired and that its exercise imputes no taint of perjury or guilt, are to be effective, then the judgment below should not stand. It is impossible to expect a jury to make nice legal distinctions when a defendant can be compelled to say, "I refused to answer before the grand jury on the ground that my answer might incriminate me."

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3. Use of a prior hypothetical statement of an attorney as a prior consistent statement of a witness. A further serious question of evidence arises in the rulings below with respect to an alleged prior consistent statement of Davis, proven on his redirect examination (Grunewald Appendix, pp. 395-407). Davis was an admitted perjurer with no law, no code, no ethics (Grunewald Appendix, p. 374). The cross examination suggested that he was fabricating his story to put the $160,000.00 he had obtained from

his clients into someone else's hands so he would not be accountable for it. The government, over objection and exception, was permitted to prove that, in 1952, when Davis saw that his clients were about to testify fully, he sought to make a deal for himself and in that connection authorized his attorney to make a hypothetical statement to the government about the $100,000.00 and the $60,000.00. In all essential respects, the very purpose of Davis in authorizing such a statement was exactly the same as attributed to him at the trial, namely to buy himself a deal with the government.

We have found no case, nor has the Government so far cited one which would justify admission of a prior hypothetical statement of an attorney. However, passing the hypothetical part for a moment, it is clear that even a prior consistent statement by the witness himself is not admissible, unless made at a time when the motive to fabricate did not exist. (*Ellicott* v. *Pearl*, 35 U. S. 412, 439-40; *Conrad* v. *Griffey*, 52 U. S. 480, 491; *Di Carlo* v. *U. S.*, 6 F. 2d 364, 366; *Dowdy* v. *United States*, 46 F. (2d) 417.)

Thus, this Davis testimony was not admissible. And certainly the nature of it as a hypothetical statement through his attorney did not permit it to be regarded as any statement of fact at all.

The error was a serious one. The testimony had a tendency to bear out Davis. It was offered for that purpose; it must be assumed it had some effect to accomplish that purpose; and, with one who was of such unwholesome character, it may have been the deciding straw. This error would require a new trial.

Wherefore petitioner respectfully prays that a writ of certiorari be granted and that the judgments below be

reversed and petitioner be acquitted or be granted a new trial.

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